
In the ORS 656.262(11)(a) Penalty Dispute of

Peper, David A., Claimant

Contested Case No: H02-133

PROPOSED AND FINAL ORDER

October 29, 2003

FREIGHTLINER, LLC, Petitioner

DAVID A. PEPER, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Self-insured employer appeals a Proposed and Final Order Assessing a Penalty of an Additional Amount Pursuant to ORS 656.262(11) issued on December 13, 2002 by the Investigations and Sanctions Unit of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). The matter was referred to the Hearing Officer Panel (now the Office of Administrative Hearings or OAH) on January 17, 2003 and the matter was set for hearing on February 28, 2003.

On February 19, 2003, OAH Administrative Law Judge (ALJ) Paul Vincent conducted a prehearing conference by telephone in Salem, Oregon to respond to a subpoena request by the self-insured employer and claimant's Motion to Quash. Judge Vincent refused to allow the subpoena pursuant to OAR 137-003-0570(5) finding that it was unlikely that the subpoena would produce information that was generally relevant to this matter. Judge Vincent also postponed the hearing inasmuch as matters necessary to the resolution of this matter were pending before the Workers' Compensation Board's (WCB's) Hearings Division.¹

On September 8, 2003, WCB ALJ Robert Brazeau issued an Opinion and Order (O & O). On October 23, 2003, OAH ALJ Ella D. Johnson conducted a contested case hearing by telephone in Salem, Oregon. Petitioning self-insured employer Freightliner LLC and its claims processing agent, Gallagher Bassett Service (employer or Freightliner) were represented by attorney Bruce Byerly. Attorney Gary Borden represented respondent David A. Peper (claimant). No witnesses testified. The record closed on the date of hearing.

ISSUES

(1) Whether the employer unreasonably delayed payment of temporary disability awarded by an unappealed August 23, 2002 Order on Reconsideration.

¹ On April 28, 2003, OAH ALJ Catherine Coburn attempted to conduct a telephone hearing in this matter. However, the WCB ALJ had not issued his decision and the matter was again set over.

(2) If proven, whether a 25 percent penalty is warranted for the 54-day delay in paying the additional temporary disability.

EVIDENTIARY RULINGS

The record consists of WCD's Exhibits 1 through 13 and employer's Supplementary Exhibit 15, which were admitted into the record without objection. Employer also offered Supplementary Exhibit 14, which claimant objected to based on relevance. I deferred ruling on the exhibit until issuance of the order. Exhibit 14 is a copy of the written closing arguments for the WCB hearing authored by claimant's attorney, which contains the number of hours spent on claimant's WCB case and the attorney fee award requested for the WCB hearing. Following my review of the exhibit, I find that Exhibit 14 is not relevant to this matter inasmuch as this is a separate proceeding from the WCB hearing. Moreover, if claimant prevails in this hearing, claimant's counsel would be entitled to 50 percent of the amount awarded to claimant as a penalty under ORS 656.262(11) in lieu of an attorney fee regardless of the attorney fee awarded by WCB. Accordingly, claimant's relevance objection is sustained and employer's Supplementary Exhibit 14 is not admitted into the record.

FINDINGS OF FACT

I affirm and adopt by reference the Facts set forth in the December 13, 2002 Sanction Unit's order with the following supplementation.

(1) Claimant was compensably injured on February 18, 2000. Employer initially denied claimant's claim but following litigation at WCB, accepted claimant's claim for right inguinal hernia on January 21, 2002. (Ex. 1.) An updated Notice of claim acceptance also accepted claimant's right inguinal hernia condition. (Ex. 2.)

(2) Claimant's inguinal hernia was subsequently repaired without residuals. Claimant became medically stationary on January 13, 2002. On February 28, 2002, employer issued a Notice of Closure (NOC), which awarded temporary partial disability for the period of June 8, 2000 through June 15, 2000 and temporary total disability for the period of November 8, 2000 through December 18, 2000. (Ex. 3.)

(3) Claimant requested reconsideration of the NOC. On August 23, 2002, the department issued an Order on Reconsideration which modified the temporary disability granted by the NOC. The department found in the section of the order considering the temporary disability award that temporary disability was due from "February 18, 2000 through February 21, 2002, from June 8, 2000 through June 15, 2000 and from November 8, 2000 through January 31, 2000 (sic)." The Conclusion portion of the order affirmed the NOC while the Order portion of the order awarded no permanent disability and modified the NOC's temporary disability award, awarding temporary disability, less time worked:

**beginning Feb. 18, 2000 and ending Feb. 21, 2000,
beginning June 8, 2000 and ending June 15, 2000,
beginning Nov. 8, 2000 and ending Jan. 31, 2002.**

(Ex. 4.) (Emphasis in original.)

(4) The Order on Reconsideration was not appealed by either party. On November 8, 2002, claimant notified the department that employer had failed to pay the awarded temporary disability and requested penalties for late payment of the award. (Ex. 5.)

(5) When the Investigation and Sanction Unit requested information from employer's claims processing agent, Gallagher Bassett Services, Inc. (Gallagher), Gallagher admitted that the payment of the additional temporary disability was late due to human error. Gallagher's claim representative explained that when she saw that the NOC had been affirmed, she just filed the order and did not audit the file to determine whether all timeloss payments had been made. Gallagher contested the February 18, 2000 through February 21, 2000 period because claimant was not off work. By check dated October 30, 2002, Gallagher paid claimant and his attorney for the additional temporary disability awarded for the period of December 19, 2000 through January 31, 2002. (Exs. 6-10.)

CONCLUSIONS OF LAW

(1) Employer unreasonably delayed payment of additional temporary disability awarded by the August 23, 2002 Order on Reconsideration.

(2) A 25 percent penalty is warranted for the 54-day delay in paying the additional temporary disability.

OPINION

The question is whether employer unreasonably delayed payment of the additional temporary disability awarded by an August 23, 2002 Order on Reconsideration and, if so, whether claimant is entitled to a penalty of 25 percent of the amounts then due. Jurisdiction lies with the director. ORS 656.262(11) and ORS 656.704(2); OAR 436-060-0155(2). Since ORS 656.262(11) prescribes no standard of review, I review *de novo*. *Archie M. Ulrich*, 2 WCSR 152, 153 (1997); OAR 436-001-0225(6). The burden of proving a fact or position rests with the proponent. ORS 183.450(2). As petitioner, employer bears the burden of proving by a preponderance of the evidence that the underlying administrative decision is incorrect. *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position.); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means

that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). I conclude that employer has failed to meet its burden.

WCD's Investigations and Sanctions Unit determined that employer's 54-day delay in paying additional temporary disability awarded by an August 28, 2002 Order on Reconsideration was unreasonable and that claimant was entitled to a 25 percent penalty based on amount then due under ORS 656.262(11), with 50 percent of the penalty to be paid to claimant's counsel in lieu of an attorney fee.

OAR 436-060-0150(5)(e) provides:

(5) Timely payment of temporary disability benefits means payment has been made no later than the 14th day after:

* * * * *

(e) The date of any division order, including, but not limited to, a reconsideration order, which orders payment of temporary disability. If a reconsideration order has been appealed by the insurer, the appeal stays payment of temporary disability benefits except those which accrue from the date of the order, pursuant to ORS 656.313;

* * * * *

Here, the Order on Reconsideration was issued on August 28, 2002. By check dated October 30, 2002, employer's claims processing agent paid claimant for the additional temporary disability awarded by the division's Order on Reconsideration for the period of December 19, 2000 through January 31, 2002. Consequently, I find that employer's payment of the temporary disability was 54 days late.

Employer concedes, and I have so found, that its claims processing agent delayed payment of the temporary disability awarded. However, the question is whether that delay was unreasonable. ORS 656.262(11) provides in pertinent part:

(11)(a) If the insurer or self-insured employer **unreasonably delays** or unreasonably refuses **to pay compensation**, or unreasonably delays acceptance or denial of a claim, **the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due**. Notwithstanding any other provision of this chapter, the director shall have exclusive jurisdiction over proceedings regarding solely the assessment and payment of the additional amount described in this subsection. The entire additional amount shall be paid to the worker if the worker is not

represented by an attorney. If the worker is represented by an attorney, the worker shall be paid one-half the additional amount and the worker's attorney shall receive one-half the additional amount, in lieu of an attorney fee. The director's action and review thereof shall be subject to ORS 183.310 to 183.550 and such other procedural rules as the director may prescribe.

(Emphasis added.)

In that regard, employer made several arguments in the alternative as to why its delay in payment of the additional temporary disability was not unreasonable. Employer previously argued that it suspected that claimant worked as a painter during the period he was collecting temporary disability and received payment for the work in cash. Because these cash payments would result in an overpayment of temporary disability, no additional temporary disability award would be due. After issuance of the WCB ALJ's O & O denying overpayment, employer argued at hearing that the 54-day delay in paying the temporary disability was not unreasonable because the manner in which the Order on Reconsideration was written was very confusing and the conclusion stated that the NOC was affirmed. Therefore, the claims representative did not realize that the temporary disability award had been modified until she was contacted by employer's attorney about the penalty request and she read the order portion of the Order of Reconsideration, which stated that the temporary disability award was modified.

Although it appears that the Order on Reconsideration may be internally inconsistent in its various parts, a claims representative should have known to look at the order portion of the division's order to determine exactly what the division was ordering the employer to pay. Consequently, I do not find that the claims representative confusion makes the 54-day delay in payment reasonable and reject the employer's argument in that regard. Consequently, I conclude that the Investigations and Sanctions Unit correctly determined that employer's 54-day delay in paying the additional temporary disability was unreasonable, warranting assessment of a 25 percent penalty on the amounts then due and affirm the underlying administrative order.

ATTORNEY FEE

Inasmuch as the current statute allows only for a 50 percent out of penalty attorney fee, claimant's counsel is entitled to no additional fee for defending WCD's order on appeal. Consequently, pursuant to ORS 656.262(11), claimant's counsel is entitled to 50 percent of the 25 percent penalty awarded to claimant for the employer's unreasonable delay in payment of his additional temporary disability.

ORDER

IT IS HEREBY ORDERED that:

The Proposed and Final Order Assessing a Penalty of an Additional Amount Pursuant to ORS 656.262(11) dated December 13, 2002 is affirmed.

DATED this 29th day of October 2003.

Ella D. Johnson
Administrative Law Judge
Office of Administrative Hearings